

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMMONWEALTH EDISON COMPANY)	
)	
Petition for approval of an Alternative Rate Regulation)	Docket No. 10-0527
Plan pursuant to Section 9-244 of the)	
Public Utilities Act)	

REPLY BRIEF OF THE
PEOPLE OF THE STATE OF ILLINOIS

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I. INTRODUCTION – RESPONSE TO COMED INTRODUCTION

In its Brief, ComEd argues that (1) the pilot Rate ACEP tariff and the projects it funds will deliver significant and identifiable benefits to customers; and (2) the pilot Rate ACEP proposal will “enable the Commission to learn, initially on a very modest basis, how operational incentive regulation works as well as whether and how much it can reduce costs to customers.” ComEd Brief at 2, 4. While it admits that its proposal has been met with “harsh opposition” (ComEd Brief at 4), it encourages the Commission to nevertheless give its ill-advised program a try, despite the unanimous agreement among Staff and the parties that the Rate ACEP plan is *not* alternative regulation, does not satisfy all of the requirements of Section 9-244 of the Public Utilities Act (“the Act”), and would only lead to higher customer rates. ComEd flippantly dismisses this unanimous assessment, opining that “improvements cannot be made if pilot efforts aimed at augmenting knowledge are killed by fear and suspicion.” ComEd Brief at 4. The Company continues to represent that “ComEd is capital constrained” and then threatens that “[t]hese projects cannot and will not be funded without approval of this Alternative Regulation program.” *Id.*

ComEd’s assessment of whether the Rate ACEP proposal satisfies the dictates of Section 9-244 of the Act is similarly off-base. In what can only be described as a tortured reading of Section 9-244(b)(1), the Company asserts that “customers’ rates will be lower than they would be if the same projects were implemented through traditional rate of return regulation,” because project O&M budgets would be set with a 5% discount. The Company’s simplistic take on interpreting what “lower rates” means includes no assessment of *net* benefits. Moreover, in comparing its Rate ACEP method of funding the capital investment and expense items with cost recovery under traditional regulation, the Company makes unrealistic assumptions about how

these expenses are recovered now, assuming in its comparison, *e.g.*, that ComEd annually files a future test year rate case to achieve the cost recovery. The Company's brief, too, conveniently ignores the unanimous conclusion by Staff and intervenor experts assessing the plan that the use of ComEd-established budget baselines as program performance metrics did not constitute the kind of objective data needed for the Commission to determine performance of the plan.

ComEd's rhetoric notwithstanding, there simply is no support in the record for adoption of the Company's Rate ACEP tariff and project proposal. As noted in the AG Initial Brief, the Company's Rate ACEP is merely a repackaging of the Company's previously submitted Rider SMP, which sought to increase customers' rates on a piecemeal basis for recovery of the costs of specific investments and expenses for targeted programs. Rate ACEP would increase rates for recovery outside of traditional rate cases for the four project areas ComEd's seeks to include at this time, but does nothing to change or improve upon the overall structure of traditional regulation. Rate ACEP does not offer any promise of lower future rate levels for consumers, reduced regulatory complexity and cost, or improved long-term operational efficiencies within ComEd that would ultimately benefit consumers.

In particular, ComEd's own budget baseline does not represent a legitimate metric for assessing utility performance as envisioned by Section 9-244 of the Act. Moreover, ComEd's entreaty for the Commission to embark on the Rate ACEP voyage is premised on two unproven assumptions: first, that the projects, as proposed by the Company, are so valued that it makes sense for customers to pay a premium over and above rates approved in the traditional rate case setting; and, second, assuming that was true, that ComEd has presented solid evidence that it has exhausted all traditionally available funding resources, such as the capital markets, to finance

these projects so that customers will not have to pay a Rate ACEP premium. ComEd failed on both those evidentiary fronts.

To be clear, the People are not asserting that the Company must show that it has capital constraints in order to enable the adoption of an alternative regulation plan under Section 9-244 of the Act. 220 ILCS 5/9-244. But what Section 9-244 demands from the Company is evidence – which it has not provided in this case -- that “the program is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program... .” 220 ILCS 5/9-244. ComEd’s version of alternative regulation is to (1) retain regular rate increases through traditional rate cases; and (2) provide itself with an *additional* revenue stream for specific projects, the performance of which is based on metrics the Company itself devised and controls. This is not alternative regulation in any sense of the term. And this is not proof that “the program is likely to result in rates lower than would have been in effect under traditional regulation... .”

Having failed to satisfy the dictates of Section 9-244, ComEd’s Brief then offers another entreaty to the Commission, arguing that “it is essential to have in place a process that allows the Commission, if it so decides, to use an alternative regulatory model” as it confronts the deployment of smart grid and electric vehicles. *Id.* at 5. ComEd opines, that “[r]efusing to approve this pilot either because of inertia or a desire to try to ‘force’ ComEd to operate only under test year ratemaking is contrary both to the vision expressed in Section 9-244 and to the public interest.” *Id.*

This rhetoric borders on the absurd. Not a single party to this case has advocated “forcing” ComEd to remain on traditional regulation. As noted in the rebuttal testimony of AG

witness Michael Brosch, the AG is not opposed to careful consideration and development of alternative regulation mechanisms that would improve upon traditional regulation and produce benefits to the utility and its ratepayers. AG Ex. 3.0 at 3-4. Once again, ComEd alone – not Staff or the parties to this docket – has the burden of justifying its proposal under the dictates of Section 9-244 of the Act. The response from Staff, the People and all other parties to this docket has *not* been an insistence that traditional regulation remain, but rather a unanimous declaration that the Rate ACEP is no way constitutes alternative regulation under any possible reading of Section 9-244 of the Act.

Moreover, the parties have expressed the united desire to let the smart grid pilot, collaborative and docket process, as envisioned by the Commission in the last ComEd rate case order (Docket Nol. 07-0566), run its course. As participants in the Illinois Statewide Smart Grid Collaborative, the People can attest that hundreds of man hours have been invested in that process. ComEd's proposal to establish a cost-recovery mechanism for smart grid investments before the Commission has had the opportunity to assess the costs and benefits of those investments, and presumably provide direction regarding a timeline for the smart grid installation are key questions that must be answered before it determines whether an extraordinary cost recovery mechanism needs to be created. Moreover, any attempt to create some alternative means of financing smart grid and other investments must be legally sustainable and comply with the provisions of the Public Utilities Act. ComEd's proposed Rate ACEP fails on all of these fronts.

Finally, as the Commission weighs the proposals offered in this docket, it must be noted that the record shows unequivocally that the financial hardships facing Chicago area residents, and thus ComEd customers, are a function not only of poverty level income, but a large and

increasing economic crisis facing working households. As demonstrated in the data provided by AG witness Roger Colton, the Commission has evidence in this docket that families have responded to the current economic crisis by reducing household spending for the first time since the U.S. Department of Labor began to track consumer expenditures. The evidence showed that people are struggling to pay their ComEd bills, Chicago area residents –not merely residents with poverty level incomes, but Chicago area working households—are losing their homes and having problems acquiring sufficient nutrition. AG Ex. 2.0 at 7-37. The Commission has a statutory responsibility and obligation to consider those interests in deciding what promotes the public interest when it weighs the interests of the Company and customers in reviewing ComEd’s Rate ACEP proposals. Setting aside the legal infirmities of ComEd’s proposal, this is no time for the Commission to approve what amounts to a surcharge *over and above the rates that will be approved in ComEd’s pending rate case* -- for projects the Company admits are not necessary for the provision of reliable utility service, and projects which its own shareholders are apparently uninterested in financing.

For the reasons discussed in the AG Initial Brief and below, the Commission should reject ComEd’s proposal in this docket.

II. RATE ACEP PROPOSAL

A. Proposed Rate ACEP Mechanism

Section 9-244 of the PUA provides that the Commission may authorize for some or all of the regulated services of that utility, the implementation of one or more programs consisting of (i) alternatives to rate of return regulation, including but not limited to earnings sharing, rate moratoria, price caps or flexible rate options, or (ii) other regulatory mechanisms that reward or

penalize the utility through the adjustment of rates based on utility performance. 220 ILCS 5/9-244. ComEd's asserts in its Brief that "its proposal is both – it is a flexible rate option that adjusts rates to reflect costs and investments and also rewards or penalizes ComEd based upon its performance implementing Commission-approved projects." ComEd Brief at 7.

As discussed below, Rate ACEP is neither of these things.

1. Proposed Budget Baseline

In this section of its Brief, ComEd describes its proposal to permit the Commission to review ComEd's proposed Rate ACEP projects prior to making the investment. ComEd Brief at 8. In the instant case, ComEd seeks advance prudence assessment of its proposed Urban Underground Facilities Reinvestment ("UUF") project, a \$5 million electric vehicle ("EV") pilot and a \$10 million low income funding initiative. ComEd would recover a return of and on its actual capital investment for each project until an order is entered in the Commission's biennial review proceeding after the project is complete. At that time, ComEd's performance on the completed project will be reviewed against the Commission-approved budget. If ComEd has completed the project at a capital cost that is within 5% of the approved capital budget (a $\pm 5\%$ "deadband"), then ComEd will continue to recover its carrying costs through Rate ACEP until such time that the investment is included in rate base in a future general rate case. In the event that the capital cost exceeds 105% of the capital budget, ComEd will collect no carrying costs on the difference between its actual investment expenditure and the budgeted amount until consideration is given to the prudence and reasonableness of the expenditure in excess of the budget in ComEd's next general rate case. Any carrying charges previously recovered under Rate ACEP for such difference (the amount above the approved budget) will be refunded to

customers. However, even when it exceeds its budgeted capital costs above the 105% benchmark, ComEd could still request cost recovery of these over-budget amounts in a rate case. Conversely, if capital investment is under budget (*i.e.*, comes in under the 5% deadband), then ComEd would share with customers on a 50/50 basis the savings realized as compared to the budget, according to the proposal. ComEd Petition at 8, par. 13. It should be noted that the \$10 million low income funding proposal includes no performance criteria or deadband incentive mechanism.

Budgets that are created by ComEd management do not represent performance benchmarks of the type employed in alternative regulation. Performance benchmarks should be objectively determined through comparisons to historical actual performance or to financial performance of peer companies, rather than against cost targets set up by the same personnel whose performance will be judged against the targets. A fundamental problem with utilization of cost budgets as performance benchmarks is the potential for scoping and timing changes to alter the amount and complexity of actual work that is deemed complete for comparison to the budget. AG Ex. 3.0 at 6. For example, the Urban Underground Facility Reinvestment (“UUFIR”) program involves a budget to, “...devote an additional \$45 million over 18 months to accelerate proactive maintenance and reconstruction of cable support equipment in manholes and the testimony, repair, and replacement of mainline distribution feeder cable in Chicago and other urban areas with underground cable-and-conduit/manhole systems.”¹ There are no specific scope of work parameters to specify what jobs will be completed in particular locations within this budget. The Company broadly states, “Under this approach, ComEd anticipates replacing or refurbishing approximately 2,400 – 3,600 additional manholes and replacing approximately 25-

¹ ComEd Ex. 4.0, lines 114-118.

37 miles of cable over the 18-month program time frame.”² Within these broad parameters, ComEd can easily alter the scheduling and scoping of UUFR work to ensure budget variances are only favorable. AG Ex. 3.0 at 5-6.

In its Brief, Staff was particularly critical of employing ComEd’s own in-house budgets as performance metrics. Staff stated:

Dr. Rearden points out that ComEd has a strong incentive to increase the budget for projects by over-estimating the market price for inputs in the budget. (Staff Ex. 1.0R, pp. 17-18) The higher the budget, the better it is for ComEd, since a higher budget never reduces ComEd’s cost recovery and could raise it. (Staff Ex. 8.0, p. 9) Further, ComEd only earns revenues less than its costs when it expends more than 105% of the budget, but ComEd shares in savings when its expenditures are less than 95% of the budget. (Staff Ex. 1.0R, p. 19) Moreover, ComEd reserves the right to ask the Commission to recover any costs above its budgets in a rate case after the project is complete. (Staff Ex. 8.0, p. 15) Staff does not believe that it can effectively monitor the budget-making process in Rate ACEP, since ComEd has much more information about its operations and costs than does Staff or any other possible party. (Staff Ex. 1.0R, p. 19; Staff Ex. 8.0, p. 12).

Staff Brief at 13. Staff witness Reardon concluded that the proposed budget metric “is a grave structural flaw that I believe to be impossible to overcome even with modifications to Rate ACEP.” ICC Staff exhibit 1.0 at 3.

The People concur that a metric involving the company trying to beat its own budget is hardly a verifiable basis for which performance and rates should be based, and certainly not a foundation for asserting that rates will be lower under Rate ACEP. AG witness Brosch characterized this as an aggressive recovery of, and conversion of, discretionary costs into new revenues for ComEd, rather than an “equitable sharing”. AG Ex. 1.0 at 34. The EV program is a pilot, for which any economic benefits are uncertain and for which ComEd’s proposal would shift costs and risks to ratepayers and away from shareholders. If the UUFR produces any net economic benefits, through reduced outages and outage response costs, the resulting cost savings

² Id. lines 131.133.

would not be shared with ratepayers until they are captured within a future rate case test year. The low income funding proposal exemplifies nothing more than a rider request for \$10 million in ratepayer funds. As noted above, it includes no performance metrics, not even a budget deadband criterion. These are facts which ComEd ignores in its self-serving promotion of projects it admits are unnecessary for the provision of electric delivery service (ComEd Ex. 6.0 at 20) and which no party disputes will add incremental charges to customer bills, in addition to rates established through a traditional rate case.

That incentive regulation formulae can be manipulated to the detriment of ratepayer interests is demonstrated by the history of such programs here in Illinois. In attempting to justify its request for alternative regulation, ComEd cites at page 8 of its Brief a general principle regarding incentive regulation that appeared in a Commission order approving an alternative regulation formula to govern Nicor Gas' purchase of natural gas on behalf of its retail customers. *Northern Illinois Gas Company, Petition for Permission to Place Into Effect Rider 4, Gas Cost, Pursuant to Section 9-244 of the Illinois Public Utilities Act, ICC Docket No. 99-0127, Order*, November 23, 1999. The Nicor Gas experiment in alternative regulation is illustrative of the dangers inherent in incentive formulae subject to utility control. The Commission is no doubt aware that Nicor filed tariffs cancelling Rider 4 and restoring Nicor Gas' purchased gas adjustment clause to its traditional status as a Section 9-220 adjustment clause on November 7, 2002, during the very first statutory review of that alternative regulation plan under 9-244(c). The withdrawal of the alternative regulation tariffs was prompted in large part by compelling evidence introduced by ICC Staff and other intervenors alleging that Nicor had manipulated the benchmark used to set gas rates to the advantage of its own interests and to the detriment of its monopoly customers. *See generally*, Revised Direct Testimony on Reopening of Richard

Zuraski, ICC Staff Ex. 1.0R (Public), filed November 23, 2010; Revised Direct Testimony on Reopening of Jerome D. Mierzwa, CUB Ex. 1.0 (Public), filed November 23, 2010; Direct Testimony on Reopening of David J. Effron, AG Ex. 1.2 (Public), filed September 10, 2009, in ICC Docket No. 01-0705, 02-0067, 02-0725 (cons.), *Illinois Commerce Commission On Its Own Motion vs. Northern Illinois Gas Company d/b/a NICOR Gas Company, Proceeding to review Rider 4, Gas cost, pursuant to Section 9-244(c) of the Public Utilities Act.* (“Nicor PBR case”). That case and the possibility of refunds due to customers as a result of, *inter alia*, Nicor’s control over incentive regulation benchmarks is still being litigated 12 years after the experiment was approved. The Commission is well-advised to heed the lessons of that experiment when considering ComEd’s proposal.

The Company’s proposal to utilize a ComEd-supplied budget as the basis for evaluating both performance and benefits of the Rate ACEP projects is a false metric, and one which Staff admits it would have difficulty validating. Staff Brief at 13. As the foundation for the rates to be established under the Rate ACEP tariff proposal, the budget metric is a principal defect in the ComEd plan.

2. Recovery of O&M Expenses

ComEd asserts that under Rate ACEP, “customers receive an immediate benefit.” ComEd Brief at 11. This “benefit” amounts to the 5% reduction in the ComEd-established budget for each project proposal, with the exception of the low income assistance expenses, up to a \$2 million cap. ComEd Brief at 11. ComEd also asserts that if the Company responds to the “proposed incentives,” those additional savings will be passed on to customers immediately. *Id.* Presumably by “additional savings,” ComEd is asserting that if they spend less than what is budgeted, then fewer dollars will be collected through Rate ACEP. ComEd witness Hemphill

suggests that by charging customers for only 95 percent of the incremental O&M expenses for the programs (other than Low Income) through Rate ACEP, customers have somehow “saved” money relative to what they would have paid under traditional regulation.³

The alleged benefits – both the 5% reduction and any additional savings ComEd may achieve and not collect through Rate ACEP – ignores, however, how ratemaking and revenue collection works under traditional regulation. As pointed out in the AG Initial Brief, in order for consumers to save, it would be necessary to assume that 100 percent of the same incremental O&M in each future year would be incrementally recoverable under traditional regulation between test years – which is clearly not how traditional, test year regulation functions and is not realistic. AG Initial Brief at 49.

The strained logic required to support an assertion that Rate ACEP could produce lower customer rates is revealed in ComEd’s Petition at page 10 with the statement, “Were ComEd to fund the same investments through traditional test year regulation – *e.g.*, by annually filing a future test year general rate case – customers would receive no 5% credit and the realization of savings would await the next rate case.” ComEd Petition at 10. Traditional regulation for ComEd has not involved annual rate cases or future test years. Even if such an approach were assumed, it would not be possible for the Company to adjust rates on a piecemeal basis for only incremental program spending, because ComEd would need to also account for growth in accumulated depreciation and accumulated deferred taxes, as well as reasonably anticipated load/sales growth, productivity gains and inflationary impacts upon all of its other costs. AG Ex. 1.0 at 41. These facts are ignored in the Company’s assertion that rates for the Rate ACEP “programs” would be lower than under traditional regulation.

³ ComEd Ex. 1.0 at 29.

Moreover, the foundation for the rate of recovery of O&M expenses is the ComEd budget baseline. In its Brief, Staff concurred that the Rate ACEP plan fails to satisfy Section 9-244(b)(1), and was particularly critical of employing ComEd's own in-house budgets as performance metrics. *See* Staff Brief at 13.

As described above, Rate ACEP can only produce higher rates to consumers and higher revenues for ComEd. Otherwise, this piecemeal rate adjustment mechanism would be of no incremental value to the Company in helping to fund the programs offered in connection with Rate ACEP. The Company's Exhibit 1.3 and 1.4 provide illustrative estimates of the revenue and customer impacts that may be expected to result from approval of the Company's plan, and the amounts shown therein all represent higher charges to customers rather than, "rates lower than otherwise would have been in effect under traditional regulation". AG Ex. 1.0 at 26.

Further, ComEd's observation that "ComEd will not recover O&M costs above the Commission-approved budget" is no comfort when ComEd is in the position to manipulate budget figures and ICC Staff admits it "does not believe that it can effectively monitor the budget-making process in Rate ACEP, since ComEd has much more information about its operations and costs than does Staff or any other possible party." Staff Brief at 13.

Accordingly, the alleged benefits associated with Rate ACEP's recovery of O&M expenses are illusory.

3. Recovery of Capital Investments

Again, Rate ACEP allows ComEd to recover a return of and on its actual capital investment for each project until after the project is complete. ComEd Brief at 11. The carrying costs of ComEd's actual investments will be recovered on a quarterly basis, calculated at the

most recently allowed weighted average cost of capital for ComEd. *Id.* Under the Company's proposal, the Commission would review ComEd's performance during the biennial review proceeding, after the project is complete. *Id.* If the project has been completed at a capital cost that is within 5% of the approved capital budget (a $\pm 5\%$ deadband), then ComEd will continue to recover its carrying costs through Rate ACEP until such time that the investment is included in rate base in a future general rate case. If the capital investment is under budget (*i.e.*, comes in under 95% of the budget), then ComEd will share with customers on a 50/50 basis the savings realized as a result. In the event that the capital cost exceeds 105% of the capital budget, ComEd will collect no carrying costs on the difference between its actual investment expenditure and the budgeted amount until consideration is given to the prudence and reasonableness of the expenditure in excess of the budget in ComEd's next general rate case. Any carrying charges previously recovered under Rate ACEP for such difference (the amount above the approved budget) will be refunded to customers. However, even when it exceeds its budgeted capital costs above the 105% benchmark, ComEd could still request cost recovery of these over-budget amounts in a rate case. ComEd Petition at 8, par. 13.

There are several reasons why this capital cost recovery scheme is no bargain for ratepayers, and fails to satisfy Section 9-244(b)(1) of the Act. First, the Company's own rebuttal testimony illustrated the problems that arise when advance regulatory approval of projects and project budgets is required. ComEd witness Michael McMahan primarily focused on issues raised by Staff in disputing the budget associated with the proposed electric vehicle pilot program.⁴ If not for the Company's proposal to include this program in Rate ACEP, there would be no need for the Commission to address the contentious assumptions and uncertainties associated with this program. If the Company instead purchased additional electric vehicles

⁴ ComEd Ex. 7.0 lines 19-267.

under traditional regulation, and later sought rate base inclusion of such costs, there would be no budget uncertainties involved and it is unlikely that any dispute would occur over the actual cost incurred to purchase fleet vehicles, absent gross procurement negligence on the part of ComEd. AG Ex. 3.0 at 7. Staff witness Reardon, too, complained of the difficulty that would be presented to Staff if it is asked to assess prudence of ComEd capital investment projects. Staff Ex. 1.0 at 9.

In addition, assessments as to when projects came in over or under the benchmark budget will be difficult because projects included within ComEd's Rate ACEP proposal are not necessarily conducive to any conclusion that work is "complete." Staff raised this concern in testimony, noting that ComEd has an incentive to declare a project complete when it nears the 95% and 105% of the budget, even if it is not finished. While ComEd shareholders share in 'savings' for costs below 95% of the budget, there is a deadband from 95% to 105% of the budget, in which ComEd is entitled to recover exactly what it spends. Above the deadband, ComEd must refund the difference between actual expenditures and the budget. If ComEd's expenditures are close to 105%, it could declare the project complete, to avoid refunds. On the other hand, when its expenditures are below 95% of the budget, ComEd has an incentive to declare that the project is complete in order to generate returns above cost from the sharing mechanism. Staff Brief at 15, citing Staff Ex. 1.0R at 23; Staff Ex. 8.0 at 16.

ComEd responds to Staff's concern about definitions of when a project may be deemed complete by stating, "ComEd considers a project to be 'complete' when all investment to be made under the Commission-approved budget have been made and the project is in service or

otherwise operational.”⁵ ComEd Ex. 7.0 at 15. Out of apparent recognition that judgments may vary on such matters, it is also noted that, “The Commission will be the ultimate arbiter of when a project is ‘complete’”. *Id.* at 16.

But completion is a subjective term when it comes to some Rate ACEP projects. Both AG witness Brosch and Staff witnesses noted that the UUFR project would expand upon the currently ongoing program of testing and maintenance or replacement of urban underground facilities. According to ComEd witness Blaise, “ComEd has historically refurbished manholes and related cables opportunistically, as failures occur or new business or capacity expansion projects require.”⁶ Under the UUFR proposal, ComEd would add work based on the proposed Rate ACEP budget, and can then deem the program complete at any point it believes has met the minimum ranges of work scope specified in proposed budgets. AG Ex. 3.0 at 9. Staff noted that some projects, like UUFR, are open-ended, and it is difficult to identify when they would be “complete.” For example, the Commission’s scope for action is unclear if ComEd stops a project and declares it complete but the Commission disagrees. The Commission may find it difficult to evaluate the project and determine the costs that ComEd should or should not have recovered. Staff Brief at 15, citing Staff Ex. 8.0 at 16.

The notion of “completion” of the AMI elements of the Company’s proposal is subject to even greater uncertainty, according to Mr. Brosch. The AMI elements are described in non-specific terms as, “...basic components that are likely to be part of any next step in the AMI arena” in the testimony of ComEd witness Fidel Marquez, and he is careful to also note that, “The specifics, however, will depend upon the results of the AMI pilot, the ISSGC, and the ICC

⁵ *Id.* lines 326-335.

⁶ ComEd Ex. 4.0, lines 95-100.

policy docket, as well as our cost-benefit analyses.”⁷ The Commission has not yet evaluated the existing AMI pilot, and the EPRI evaluation of that ratepayer-funded pilot is not expected until late summer of 2011. More importantly, the Commission has not even initiated, let alone completed, the formal docket that will examine and evaluate the two-year long work of the Illinois Statewide Smart Grid Collaborative (“ISSGC”). Creating a cost-recovery mechanism for such vaguely defined projects is premature, to say the least, and yet another reason why the Rate ACEP plan should be rejected.

B. Description of Proposed Projects

1. Urban Underground Facilities Reinvestment (“UUFR”)

ComEd writes in its Brief that while the Company “already provides acceptable levels of reliability, ComEd is proposing the UUFR project to build on those levels of reliability and to prevent problems that might otherwise occur.” ComEd Brief at 15. The Company opines that Commission approval of the accelerated UUFR project “will provide a significant enhancement to the performance of the underground cable system, reducing customer interruptions.” *Id.* ComEd points to four specific benefits that will accrue to ratepayers:

- 1) Improved reliability;
- 2) Improved safety;
- 3) Meaningful job creation; and
- 4) Potential reduction in long-term costs.

ComEd Brief at 18-20.

While the work associated with UUFR is important, ComEd’s principal UUFR witness Michelle Blaise testified that there is nothing improper or imprudent about the Company’s

⁷ ComEd Ex. 3.0, lines 66-73.

current approach to underground facilities maintenance. On cross-examination, she stated that, in the Company's annual capital budget process, UUFR investment proposals have been based upon prioritizing reliability and customer needs. Tr. at 69-70. Ms. Blaise admitted that in the past, she has proposed approval of accelerated UUFR investment in the Company's annual capital budget. Those proposals were ultimately rejected by the Company due to other capital priorities. Tr. at 71-73.

As noted in the AG Initial Brief, based on this testimony, and under these circumstances, there has been no showing by ComEd that existing urban underground facility maintenance practices or spending levels are inadequate or that customers should be made to fund, through a separate Rate ACEP charge, more aggressive testing and replacement of such facilities in order to correct unreliable or unsafe conditions or cost effectively create new jobs. If a more pro-active (accelerated) maintenance policy was appropriate and cost justified, ComEd presumably would have commenced such spending and proposed recovery for such investment in the context of its overall rate case revenue requirement, rather than a discrete Rate ACEP surcharge. That has not occurred. Even if the Commission accepts Ms. Blaise's suggestion that paying for an accelerated level of investment provides some level of improved reliability, there is no specific information provided in the Company's filing identifying or quantifying any benefits, nor any showing that such benefits are not achievable under traditional regulation. As noted by Staff witness Harry Stoller, the Company "does not explain why customers should pay a premium for service quality that is not required by law or any other standard he has identified." Staff Ex. 7.0 at 6. In addition, the Company provided no evidence that the proposed UUFR program "will, in fact, actually move ComEd's delivery service quality beyond what is required to meet service requirements." *Id.* Ultimately, every Company investment decision involves weighing the costs

and benefits of a particular proposal. UUFR investment is a part of ComEd's annual capital spending each year. Tr. at 74-75; ComEd Ex. 4.0 at 6-7. The fact that any form of accelerated UUFR investment has not survived the capital budget process due to other pressing customer and reliability needs does not constitute proof that ratepayers should be assessed an additional charge for such investment. This information, to the contrary, argues against assessing ratepayers for the investment. If ComEd's own executives do not believe in the cost-effectiveness of UUFR acceleration, then ratepayers should not be forced to foot the bill through an add-on charge.

Moreover, the Company presented no specific evidence of a financial need for Rate ACEP related to UUFR investment. To be clear, the People are not arguing that Section 9-244 petitions require proof of financial need for proposed alternative regulatory plans. In this docket, however, the Company has presented the Commission with a petition *that leaves traditional regulation (rate cases) in place and augments that form of cost recovery through an additional (Rate ACEP) charge*. Given that proposed cost recovery framework and the requirements of the Public Utilities Act that rates shall be least cost, putting aside for the moment the legality of such a mechanism, requires proof of financial need. But ComEd failed to show, and indeed claimed it did not need to show -- that it could not simply go to the capital markets and finance the additional Rate ACEP investment projects rather than assess ratepayers a discrete surcharge each month for the projects, over and above the amount paid through traditional regulation.

As noted in the AG Initial Brief, the Commission, in a past order, has specifically rejected the notion that ratepayers should pay extra charges for capital projects that are of a type normally funded in base rates and do not survive a utility's own capital budget process. In ICC Docket No. 07-0585 (cons.) (Ameren Illinois Utilities – Proposed general increase in delivery service rates), Ameren proposed Commission adoption of a mechanism that, like Rate ACEP,

would assess a surcharge outside for specific, discretionary capital projects. ICC Docket No. 07-0585 through 07-0590 cons., Order of September 24, 2008 at 238-239; *See* AG Initial Brief at 10-14.

Like the Rider QIP projects at issue in the Ameren case, UUFR investment is normally recovered in base rates. Like the Ameren Rider QIP projects, the accelerated level that ComEd seeks cost recovery of through Rate ACEP is simply an accelerated amount that failed to pass its own capital budget process. And, like Ameren, ComEd failed to show in this docket that it made any attempt to, or in fact could not, access the capital markets to fund the accelerated investment.

AG witness Brosch's review of the proposed UUFR program and Rate ACEP tariff revealed that the ComEd proposal amounted to illegal, single-issue ratemaking. AG Ex. 1.0 at 34, 40. Mr. Brosch characterized the accelerated UUFR/Rate ACEP proposal as *not* equitable sharing, but rather an aggressive recovery of and conversion of discretionary costs into new revenues for ComEd. If the UUFR produces any net economic benefits, through reduced outages and outage response costs, the resulting cost savings would not be shared with ratepayers until they are captured within a future rate case test year, highlighting the single-issue ratemaking aspects of the rate. AG Ex. 1.0 at 34.

Staff reviewed the UUFR project and, to ComEd's dismay, determined that acceleration was necessary to meet the requirements of Section 8-401 of the Act and should be implemented irrespective of whether ComEd receives approval of and moves forward with its Rate ACEP proposal. Staff believes the UUFR program would be prudent, and if the reliability work is completed, it should be used and useful. Simply put, Staff believes the work should be done and that reasonable costs of the UUFR project are recoverable by ComEd. Staff Brief at 17-18.

In rebuttal testimony, ComEd witnesses opined that if the Commission required the UUFR project to be implemented it would necessitate significant cutbacks or displacement of other reliability projects. Staff responded in testimony that this argument has no merit. The UUFR project represents a modest part of ComEd's total rate base and a fraction of ComEd's approximately \$900 million annual additions to rate base. In addition, if ComEd were to hypothetically reduce a program with a higher CPAC than the UUFR project such as the tree trimming program, ComEd would be in violation of a National Electric Safety Code Rule. In his rebuttal testimony, Staff witness John Stutsman added to his recommendation that the Commission order ComEd to report the details of all programs and projects that are displaced or cutback because of ComEd's implementation of the UUFR project. Staff believes this additional information would alert the Commission, should the need arise, if it is necessary to initiate future actions or investigations into ComEd's activities. Staff Brief at 20-21, citing Staff Group Cross Ex. 1, pp. 35, 37, Staff Ex. 11.0 at 16.

ComEd's rebuttal testimony contended that the UUFR project was not necessary because it improved reliability beyond the levels that are required by the applicable laws, regulations, and regulatory decisions. Com Ed Ex. 6.0 at 29-30. Because of programmatic concerns inherent in the design of the Rate ACEP projects, Staff believes customer interests would be better served by ComEd recovering its reasonable costs of the UUFR project in a future rate case. If the Commission issued a Section 8-503 order directing ComEd to initiate the UUFR project, ComEd acknowledged that an order from the Commission regarding UUFR would solve the regulatory risk problem and there would be little doubt that reasonable costs would be afforded recovery in its next rate case. This would further maintain consistency with the requirements of Section 1-102(d)(vi), which is further supported by Staff's belief that, due to regulatory lag, ComEd would

reap operational savings which could offset any O&M expenses brought about by the implementation of the UUFR project until the rates from its next rate case become effective. Staff Brief at 20-22.

The People have reviewed the UUFR proposal within the context of the Company's Rate ACEP proposal under Section 9-244 of the Act, but not within a specific delivery service reliability assessment. Acceleration directives, with or without Rate ACEP, will impact customer rates, and it is unclear from this record whether the acceleration Staff seeks is needed. What is clear, however, is that the evidence shows that requiring ratepayers *to pay a premium for* any enhanced reliability related to the UUFR project is neither supported by the record nor legal. Staff concurs that the Rate ACEP mechanism should be rejected. However, should the Commission believe the evidence supports a finding that ComEd should be required to accelerate its UUFR activity, the People agree that such costs should be recovered in a future rate case – not through a repackaged rider that illegally and unfairly provides an incremental, revenue stream for ComEd between rate cases without passing along the operational savings arising from the accelerated work.

2. Utility Electric Vehicle (“EV”) Pilot

a. ComEd Made No Showing its Proposed EV Pilot Will Benefit Ratepayers.

ComEd describes their EV pilot program as a proposal to invest \$5 million dollars in different types of utility EVs for its vehicle fleet and associated charging stations.⁸ ComEd Brief

⁸ Plug-in EVs or PEVs “unlike hybrids, derive all or a significant portion of their motive power from being charged through the electric grid.” ComEd Brief at 22; Tr. at 119. Hybrid vehicles are defined as one that “self-charges through regenerative charging off the braking system and oftentimes, has an internal combustion engine.” Tr. at 119-120. A Plug-in hybrid or PHEV “carries a plug with it. It’s the same as a hybrid, but you can also plug into a socket to charge the battery as well as from the regenerative braking.” *Id.* at 120.

at 22; ComEd Ex. 2.0 at 4; ComEd Ex. 1.0 at 6. More specifically, ComEd Witness McMahan states that the purpose of the EV Pilot “is to evaluate the operation of electric vehicles in a fleet in the Chicago area and assess life cycle costs” Tr. 141.

While ComEd emphasizes that the EV pilot relies heavily on an assessment of Plug-in EVs (ComEd asserts “[t]hey are the next generation in clean vehicle technology.” ComEd Brief at 22-23), the EV Pilot and associated costs also includes hybrid vehicles (non pluggable), Plug-in hybrids (“PHEVs”), and charging stations. In fact, thirty five percent (35%) of the Company EV Pilot Budget is for vehicles that are not plug-in EVs. Also, two of the non-plug-in EVs are PHEV digger-derricks budgeted at a total cost of \$700,000.⁹

While ComEd expects its ratepayers to pay a premium for the pilot, over and above rates collected through its pending rate case, the details and anticipated benefits of the pilot remain vague at best. For example, ComEd failed to provide sufficient information to determine if the sample size for the vehicles chosen would provide meaningful information or in a statistically valid manner. Indeed, when Company witness Michael McMahan was asked if the two digger derricks that are proposed in the current pilot provided “a sufficient sample size,” he stated, “Well, no... We’d like to have more.” Tr. at 187-188.

ComEd discussed certain alleged benefits associated with their EV Pilot, and asserted that “little information is available about the total life-cycle costs of these vehicles in a fleet

⁹ ComEd has already received money under the Clean Cities Grant for certain hybrid vehicles and charging stations. Accordingly, ComEd witness Mr. Michael McMahan stated, “There’s been some money awarded for ComEd in the Clean Cities Grant to have some bucket trucks, some hybrid bucket trucks; not electric vehicles; some hybrid Ford Escapes; and one digger derrick truck, hybrid once again. And that’s a – and 36 charging stations.” Tr. At 134.

environment.” ComEd Brief at 25-26, citing ComEd Ex. 2.0 at 3-4. While ComEd opines “there is little information about how such vehicles perform,” this does not ring true with the facts. Currently, there is significant information available, including information in the ComEd service territory, regarding electric vehicles and how they function. *See* AG Initial Brief at 19.

ComEd currently has hybrid vehicles and PHEV in its existing fleet funded by ratepayers, and participates in an EPRI and Clean Cities grant projects. Staff Ex. 2.0 at 21; Staff Ex. 9.1, Part 1. ComEd failed to explain what if any additional net benefits will result from the proposed EV Pilot that will be incremental to the knowledge gained from their existing ratepayer-funded fleet within the ComEd service territory or other private or government-funded studies.

The evidence demonstrates that assessing a discrete charge through Rate ACEP for an EV pilot is unnecessary, will result in higher rates and provides no discernible benefits to ratepayers. As highlighted in the AG Initial Brief, ComEd could conduct their EV Pilot through traditional rate of return regulation without any difficulty. According to ComEd, the Company currently owns 10 converted plug-in hybrid electric vehicles (Toyota Prius); and nine hybrid electric bucket trucks (International/Eaton). ICC Staff Exhibit 2.0 at 7; Staff Ex. 9.1, Part 1. Notably, in his rate case testimony in pending Docket No. 10-0467, ComEd witness McMahon addresses ComEd’s fleet of approximately 3,300 vehicles, including various hybrids, biofuel and flex-fuel vehicles.¹⁰ The 59 incremental vehicles proposed under the EV Pilot program represent replacement of less than two percent of the entire fleet.¹¹ In the normal course of business, ComEd would expect to replace at least 150 to 200 vehicles annually, given its depreciation

¹⁰ AG Ex. 1.0 at 27. Docket No. 10-0467; ComEd Ex. 9.0 Rev. at 44-45.

¹¹ ComEd Ex. 2.0, page 5, shows the planned quantity of EV vehicles for the Pilot would include 45 plug-in cars, 8 cargo/service vehicles, 4 hybrid bucket trucks and 2 PHEV digger-derrick vehicles.

accrual rates of 11.59% for passenger cars, and a range for various types of trucks from 5.72% to 12.04%.¹²

As explained by Mr. Brosch, there is nothing special about the EV pilot, as it could readily be absorbed into ComEd's routinely large need to deploy replacement vehicles each year. However, rather than simply integrating the proposed EV Pilot into normal vehicle replacements, Rate ACEP clearly envisions shifting all the up-front costs and risks of the Company's planned EV research project onto customers, even though any customer benefits from this pilot are far from certain. *Id.* at 27-28.

Staff witness Jennifer Hinman concurred that it is unnecessary and non-beneficial to ratepayers to recover costs associated with EVs through the Rate ACEP proposal. She points out ComEd's current fleet is comprised of mostly alternative fueled vehicles, noting that ComEd's website states that the Company's green fleet includes the following vehicles:

- 1,774 trucks that use biodiesel fuel (20% soybean oil, 80% diesel)
- 250 E85 flex-fuel vehicles capable of being fueled with ethanol
- 91 hybrid Ford Escape SUVs
- 40 Prius hybrids
- 10 Prius Plug-in hybrid electrical vehicles (PHEV)
- 2 biodiesel-electric hybrid bucket truck
- 1 liquid petroleum gas (LPG) bucket truck

Staff Ex. 2.0 at 9-10. As such, alternative-fuel vehicles already represent 63 percent of ComEd's total fleet of cars and trucks. *Id.* Given these numbers, ComEd has hardly made the case that ratepayers should pay an additional premium for a pilot study of EVs that provides no discernible customer benefits.

¹² ComEd's rate case filing in Docket No. 10-0467 includes disclosure of depreciation accrual rates under Part 285.305 (e); AG Ex. 1.0 at 27.

b. Rate ACEP Provides a Disincentive to Lower Customer Costs as Compared to Traditional Rate of Return Regulation

As noted above and in the AG Initial Brief, Rate ACEP's use of a ComEd-established budget as a metric for project performance is critical defect in the Company's proposal. Staff witness Rearden also described why Rate ACEP misaligns Company incentives, or rewards ComEd to maintain higher rates than would be seen under traditional rate of return regulation, noting that "ComEd has a strong incentive to overestimate the budget" and that "there appears to be nothing in Rate ACEP to prevent ComEd from strategically declaring a project complete to reap benefits from the incentive scheme." Staff Ex. 1.0 at 19-20, 22. In contrast, under traditional regulation, he noted that a prudent utility "plans the best it can and invests efficiently. If the utility cannot justify its expenditures, then it can be at risk for a disallowance." *Id.* at 8. He called this "a very important incentive for the utility and an important safeguard for ratepayers." *Id.*

Clear evidence of the problems generally described by Staff witness Staff witness Rearden specifically apply to the EV pilot proposal. Staff witness Jennifer Hinman, who specifically examined the EV pilot proposal concluded that "(t)he Company has every incentive [citation omitted] to inflate the budget proposed to the Commission to stay far enough under budget to complete the program and thereby profit substantially." Staff Exhibit 2.0 at 3.

ComEd in their brief attempts to minimize the discrepancy between the Company-developed budget and the cost evaluation conducted by Staff witness Hinman. For instance the Company argues that disputes concerning the estimated costs of the various vehicles and other facilities to be used for the pilot" were addressed by the Company when it explained "that bucket truck costs vary widely depending on the type of mounted aerial equipment as well as other

vehicle components such as lighting and storage compartments.” ComEd Brief at 26, citing ComEd Ex. 7.0, 2:36-3:56.

While the Company is steadfast in its belief that the EV Pilot budget is reasonable, a comparison of its budget to Staff’s detailed analysis reveals a different story. In fact, Ms. Hinman, determined the Company developed an inflated budget by over twenty percent. Staff Ex. 2.0 at 22. While the Company may disagree, the controversy exposes the fact that the EV pilot under Rate ACEP gives the Company tremendous control without transparency over certain information necessary to identify, verify, or double check the Company’s budget. In one case, for example, Mr. McMahan supported his cost estimates by stating, “per-unit costs for charging infrastructure are based on estimates generated from conversations with charging infrastructure providers, and not actual quotes for work.” ComEd Ed. Ex. 7.0 at 13.¹³ How Staff or intervenors could ever verify these kinds of statements is an unanswered question that will fade away in any future Rate ACEP project review proceedings.

Additionally, Ms. Hinman states:

Details such as model numbers and technical specification that are missing from the proposed budgets may have significant impacts on ComEd’s final investment expenditure amounts. ComEd appears to be able to choose to complete a program under budget, especially if it overestimates the cost to purchase assets and ends up purchasing different cheaper models.... Different models and manufacturers of virtually the same type of vehicle have significant differences in costs. When the monetary incentive is tied to a budget, the Company will have an incentive to spend under budget. The more inflated the budget, the greater the profit opportunities are, and the more likely it is that ratepayers will be paying higher rates under the Alt Reg mechanism than they would otherwise pay under traditional rate of return regulation.

ICC Staff Exhibit 2.0 at 9.

¹³ Staff witness Ms. Hinman in reviewing vehicle cost estimates provided by the company stated, “[the manufacturers’ websites have the prices of new vehicles protected such that only members/previous customers can view the prices.” ICC Staff Exhibit 2.0 at 7; Footnote 3.

Another example of the budget frustration relates to tax credits and grants that were not taken into account in the initial EV pilot budget. While Mr. McMahan accepted the recommendation of Staff witness Hathhorn to modify the Rate ACEP tariff to account for any grants or credits that ComEd uses (ComEd Ex. 7.0 at 11), it did so only after Staff pointed out the problem.

Thus, the EV Pilot under Rate ACEP is not a regulatory environment that ComEd witness Ross Hemphill described as “assumptions and numbers [that] can be double checked... .” ComEd Ex. 6.0 at 13. Instead it is more appropriately described by Staff witness Ms. Hinman as ComEd asking the “Commission to place a great deal of trust in ComEd’s AltReg proposal and Rate ACEP budget estimates.” ICC Staff Exhibit 9.0 at 21; Staff Brief at 32. The People would merely add that along with the Company “trust-us” budget is an incentive mechanism that rewards the Company for an inflated budget.

The Commission should reject the Company’s request for funding an EV pilot under Rate ACEP. As discussed above and in the AG Initial Brief, the ComEd’s self-serving budget baseline proposal misaligns Company incentives, and rewards ComEd to maintain higher rates than would be seen under traditional rate of return regulation. Additionally, Rate ACEP clearly permits a shifting of all up-front costs and risks associated with the EV project onto customers, who would reap no discernible benefit from the study.

3. Low-Income Customer Assistance Program

ComEd’s account of its Low Income Program does not attempt to persuade the Commission that this portion of its alternative proposal meets any of the criteria set forth in

Section 9-244 of the Act. In fact, ComEd's discussion of this issue does not mention alternative regulation even in theory. ComEd Brief at 28-29. Instead, the Company's brief simply describes the proposed programs in a general way, leaving the reader to wonder how they fit into the context of alternative regulation. Most significantly, ComEd has not established the requisite nexus between these programs and the likelihood that their inclusion in the Company's alternative regulation proposal would result in rates "lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program...." 220 ILCS 5/9-244. Nor does the Company show how the low-income programs meet any performance-based standards or any other criteria set forth in Section 9-244 of the Act.

ComEd provides no rationale whatsoever to explain why the assistance programs that are the subject of its petition are somehow distinct from similar assistance efforts and why these distinctions make them particularly suited for "alternative regulation" treatment. Most significantly, the Company cannot explain why programs previously deemed worthy of shareholder support for the past five years can now survive only if the Commission approves the Rate ACEP surcharge. Although ComEd's brief states that it began the CARE programs in 2007, the record demonstrates that these programs were actually initiated on ComEd's own initiative in 2006 and funded by Exelon shareholders, before the Company had any legal obligation to do so. AG Cross Ex. 5, p. 1 and Attach. 6; Tr. 340-41 and Tr. 363. It appears that the Company's goal for alternative regulation is to shift 100% of what was once deemed shareholders' responsibility for low-income payment assistance entirely to ratepayers, *in addition* to the low-income assistance that ratepayers already provide.

Staff's brief notes that ComEd has "agreed to fund its Care programs through 2011." Staff Brief at 44. But not all of the CARE programs will be continued in 2011. The evidence

demonstrates that ComEd is continuing three of its CARE programs into 2011 (as required by Section 8-105 of the Act) *with ratepayer funding*. The Residential Special Hardship program, the Helping Hand program and ComEd's Education and Outreach efforts were the subject of a petition filed by ComEd with the Commission in November 2010. As a result of the Stipulation adopted in that order on January 5, 2011, the Commission directed that for 2011, these three CARE programs would be funded by a portion of the "incremental change" to charges imposed on customers to benefit the Illinois Supplemental Low-Income Energy Assistance Fund, pursuant to the Energy Assistance Act, 305 ILCS 20/13. *Commonwealth Edison Company, Application for Approval of a Payment Assistance Plan, Including a Percentage of Income Payment Plan, Offered Under the Authority of Section 8-105 of the Illinois Public Utilities Act*, ICC Docket No. 10-0640, Order, January 5, 2011 at 6; P.A. 96-0033.

With ratepayer funds now supporting three CARE programs that were previously funded by the Company, ComEd's petition proposes that the Commission should include low-income assistance in its alternative regulation plan so that shareholders can be relieved of even more responsibility in this regard. In addition to continuing to pay for the three existing CARE programs, the Company wants ratepayers to take on funding for four additional CARE programs in 2012 and 2013. Petition at 5,6; ComEd Ex. 5.01 at 1. This proposal come across as incredibly parsimonious, especially in view of the tens of millions of dollars spent on CARE programs by ComEd and its Exelon shareholders since 2006.

While ComEd estimates that its programs have "an expected dollar value of benefits to customers between \$10 and \$1,000," ComEd Brief at 28, it is the value of having ratepayers pay the Rate ACEP surcharge that exposes the real economic impact of the Company's plan. AG witness Roger Colton explained in detail how allowing the Company to fund its low-income

programs with ratepayer dollars would permit double recovery. ComEd's responses to discovery revealed that most of the 2010 CARE funding was used to retire pre-existing customer debt. In fact, Colton points out that \$9.225 million in expenditures out of ComEd's proposed \$10 million annual program budget would be applied to the retirement of arrears. This would be unremarkable, except for the fact that the Company is already compensated for the anticipated nonpayment of arrears through the uncollectible expense included in base rates. AG Ex. 2.0 at 40 and Appendix B.

Colton described other significant ways in which RATE ACEP's low-income assistance component would "generate a reduction in expenses to the Company which will redound to the benefit of investors as increased earnings," unlike in a general rate case, in which those expense reductions would be recognized and balanced with changes in revenue to set a revenue requirement. AG Ex. 2.0 at 41-42. First, the ratepayer-funded low-income assistance program portion of the Company's alternative regulation plan would reduce the write-offs associated with pre-program arrears. *Id.* at 42. Second, these programs would have a positive impact on both write-offs and working capital attributable to bills for current usage. *Id.* Third, Rate ACEP will permit the Company to funnel dollars spent on collections activities away from beneficiaries of the program and focus them on other customers who would not otherwise be subjected to collection activities. *Id.* at 43. Finally, the inclusion of low-income assistance programs as part of Rate ACEP will help increase the Company's revenues because to the extent such a program reduces the number of service disconnections, the utility can reduce the sales losses normally experienced while a customer is off the system. *Id.* at 44.

In recommending that the Commission reject the low-income assistance aspect of ComEd's petition, Staff argues convincingly that utility ratepayers already do their part in

supporting customers-in-need, noting that Illinois law requires utility customers to contribute significant amounts to low-income energy assistance funds on an annual basis. Staff Brief at 44, 46. Colton reminds the Commission that Exelon's financial picture is excellent and consistently improving every quarter, an undeniable fact that belies the need to transfer these expenditures to ratepayers. AG Ex. 2.0 at 45. Ratepayers, on the other hand, are not so fortunate. AG witness Colton provided compelling data about ratepayer finances that confirm that significant numbers of ComEd ratepayers are in no position to absorb and additional, Rate ACEP surcharge added on to any rate increase awarded the Company in the Company's pending rate case, Docket No. 10-0467.

The People agree with Staff that ratepayers who struggle with bills every month, and who are facing the possibility of a third rate increase in five years, are paying enough. The Company has not met its burden of proof to justify either the inclusion of these programs in any alternative regulation plan or the recovery of their costs through a surcharge. The Commission should reject ComEd's request that any alternative regulation plan include a low-income assistance component.

C. Mechanism for Future Rate ACEP Projects

1. Subsequently Approved Smart Technology Investments

In its Brief, ComEd argues that Rate ACEP is well-suited to accommodate future smart grid projects and that alternative regulation would "coordinate policy and investment decisions." ComEd Brief at 29. ComEd complains that the "utility decides and regulators review years later" model may have worked for conventional investments that were aimed at simply "keeping the lights on", but no longer fits the smart grid world. *Id.* at 30. ComEd also asserts that the Rate

ACEP advance prudence aspect of the proposal will provide the Company with needed certainty that the Commission will not disallow cost recovery of smart grid based on prudence evaluations. *Id.* at 30.

While the argument that smart grid investment cannot be accommodated by the regulatory lag inherent in traditional rate regulation may sound compelling in theory, the reality of the Company's own investment and cost recovery behavior belies this philosophy. First, ComEd has been investing in smart grid technology for years through traditional ratemaking. ComEd Ex. 2.0 at 8. ComEd has invested in various forms of distribution automation and then followed up that investment with regular biennial rate cases since 2005. Thus, the "lag" component of traditional ratemaking's regulatory lag has been minimized by the Company's own rate case filing frequency.

It should be noted, too, that in each of these cases (ICC Docket Nos. 05-0597, 07-0566, 10-0467), the Company used historical test years. ComEd always has the ability, under the Commission's rules, to file a future test year in its filed rate cases in an effort to include future plant investments in customer rates. 83 Ill.Admin.Code Part 287.20. The Company, however, has chosen not to take advantage of this option. While the Commission or General Assembly may at some point determine certain smart grid investments are in need of special cost recovery, that assessment or conclusion has not yet occurred, and indeed should not be forced prematurely through a Section 9-244 proceeding.

Second, the notion that ComEd is at risk for Commission disallowance of smart grid investments contradicts the Company's own views about the importance, cost-effectiveness and public policy reasons for smart grid investments. The Company appears to be convinced that

smart grid investments make sense on all of these fronts. The Company failed to point to a single instance in which the Commission had disallowed a ComEd investment based on imprudence. As for rate case disallowances, the issues driving overall revenue changes being proposed by AG and CUB in the current rate case are not Plant in Service prudence disallowances, so much as correction of the test year rate base distortions and disputes surrounding pension, rate of return and other typical rate case issues. AG Ex. 3.0 at 10. The risk of disallowance ComEd believes justifies its proposed Rate ACEP approach to enabling smart grid investment simply does not exist, based on the record in this case and recent Commission orders. Rather the proposal is more about providing an incremental revenue stream for projects it admits are not necessary for the provision of safe, reliable delivery service outside of traditional rate cases.

Rate ACEP, too, would only augment ratepayers' financial burdens without providing any discernible benefits. AG witness Roger Colton highlighted the financial troubles ComEd ratepayers are facing now, as discussed further in Part D.II of this brief, below. *See* AG Ex. 2.0 at 7-37. ComEd dismisses these realities, suggesting that unless the Commission moves quickly and adopts the Rate ACEP program, "Illinois also risks ceding its important role in guiding the development and deployment of Smart Grid technologies", and warns that "[o]ther utilities and states are already moving forward..." ComEd Brief at 31. The Commission should reject this rhetoric. Replacing existing customer meters in the ComEd service territory, which have not outlived their useful lives, with digital AMI technology is a decision that must be based on a blueprint that includes sound cost-benefit analyses, the AMI pilot evaluation and stakeholder input. Approving Rate ACEP as *the* cost recovery vehicle for smart grid technology is akin to a homeowner approaching a bank for a loan approval without knowing what she plans on

purchasing. ComEd's promise to implement new smart grid investments through the Rate ACEP project approval dockets is neither a smart grid blueprint or a clear definition of what customers will be buying in the long run.

Determining how to pay for smart grid investments must be guided by policy decisions that have yet to be developed. The last time ComEd put a dollar figure on the cost of AMI replacement – in its 2007 rate case -- it asserted that the cost would exceed a billion dollars. ICC Docket No. 07-0566, ComEd Ex. 23.0 at 8; Tr. 200. No updated figures have been provided in this case. That missing piece of the puzzle should be critical to evaluating a cost recovery mechanism.

2. Proposed Future Use of Rate ACEP as a Cost Recovery Mechanism

As noted in the AG Initial Brief, the Commission established a specific timeline and evaluation process for smart grid investments in both its orders in ICC Docket No. 07-0566 and 07- ICC Docket No. 07-0585 (cons.). *See* ICC Docket No. 07-0566, Order of September 10, 2008 at 143; ICC Docket No. 07-0585(cons.), Order of September 24, 2008 at 262. ComEd's Rate ACEP proposal, however, essentially eviscerates that deliberative process, by requesting that the Commission approve a cost-recovery mechanism for smart grid and other unnamed investments that the Company admits cannot survive its own capital budgeting process.

ComEd asserts in its Brief that the Rate ACEP proposal would allow the Company to “move forward immediately following the Smart Grid implementation proceeding as a cost recovery mechanism would already be in place.” ComEd Brief at 32. As noted above and in the AG Initial Brief, however, the establishment of an extraordinary cost recovery mechanism before

the Commission knows what it will be used to pay for is a classic case of putting the cart before the horse.

The Commission, too, specifically rejected the notion that a cost recovery mechanism could be established without an overall plan for smart grid investment being presented to the Commission. (“With regard to AIU's suggestion that smart grid costs may be recovered through Rider QIP, the Commission is even less comfortable with that idea. While the Commission believes that moving toward a smart grid is appropriate, plans to do so must be well thought out. Before the Commission will consider cost recovery for smart grid improvements, it must be confident that the improvements are practical and cost effective. At this time, it does not appear that AIU is close to having a plan for implementing a smart grid.”) ICC Docket No. 07-0585 (cons.), Order of September 24, 2008 at 263-264.

Like Ameren, ComEd readily admits it has no “plan” of any kind related to smart grid. Tr. at 599-560. Mr. McMahan, in his testimony, admits that the Company cannot identify with any degree of certainty what distribution automation equipment the Company would propose be recovered through Rate ACEP. ComEd Ex. 2.0 at 9. Approving a specific cost recovery mechanism now, before the Commission has had an opportunity to 1) evaluate the two-year’s worth of work of the Illinois Statewide Smart Grid Collaborative through the formal Policy Docket, 2) evaluate the results and lessons learned from the AMI pilot, and 3) review a specific smart grid utility plan, is premature. The Commission simply does not yet have the facts to determine what, if any, special cost recovery mechanism is needed.

ComEd’s Rate ACEP proposal is the polar opposite of an organized framework for smart grid investment. Instead of providing a blueprint for entering the digital electric delivery service

age, it promises only to provide piecemeal proposals for capital investment projects that will require incremental funding by ratepayers between and in addition to rate increases granted through traditional ratemaking. Such an approach is neither innovative nor fair.

As noted above and in the AG Initial Brief, the Company also failed to prove that financial need necessitated customers paying a premium (Rate ACEP surcharge) for the discretionary projects the Company proposes. ComEd, however, does not want to talk about its finances or whether it, in fact, requires up-front ratepayer financing for discrete projects, stating that “the issue is not whether ComEd can access capital markets.” AG Ex. 1.0 at 23. The Company goes on to assert that its financial position may be harmed without both Commission pre-approval and piecemeal rate increases to fund these discretionary projects. *Id.* Under traditional regulation the Commission relies on a utility’s access to the capital markets both to provide capital for needed investment and as a means to incorporate investors’ judgments about reasonable investments. Effectively, ComEd is attempting to replace investors’ judgment about whether a project is economically justified with Commission pre-approval when it may not be economically justified. Under Rate ACEP, the Company is looking to ratepayers to provide a source of new revenues for projects that would otherwise not likely be approved in the Company’s own internal capital budgeting process, as the Company itself admits when it asserts that these projects, if invested in under traditional regulation, “would harm ComEd’s financial position.” Rate ACEP, thus, is nothing more than a shifting of economic risk away from ComEd shareholders to monopoly ratepayers.

For all of these reasons, Rate ACEP should be rejected as a cost recovery mechanism.

3. Proposed Rate ACEP Review Procedure

ComEd outlines in its Brief the biennial review procedure that is a part of its Rate ACEP proposal. ComEd Brief at 33. As noted in the AG Initial Brief, the biennial review process as well as the Rate ACEP project review and approval process only adds to the complexities and regulatory burden of setting rates for ComEd. *See* AG Initial Brief at 31-35. Conspicuously absent is any mention of the drawn-out workshop and five-month review process that is the foundation of the Rate ACEP mechanism.

Any Rate ACEP project approval filing would involve a ComEd filing by October 1st and a Commission Order by the following April 1st, thus adding five-month Rate ACEP project review proceedings to the Commission's usual workload. Tr. at 571-572. In the filing, the Company would be requesting an advance prudence determination on the investment at issue from the Commission. Tr. at 582. Under the timeline ComEd envisions, a workshop process involving the Company, Staff and intervenors would start before the first Rate ACEP filing and would precede each Rate ACEP filing. Tr. at 574-576. The workshop process would start with consideration of the particular ComEd investment proposal. Tr. at 576-577. That ComEd proposal would then be reviewed and analyzed by Staff accountants, engineers and economists in order to assess, for example, the proposed budget baseline.

As noted in the AG Initial Brief, the Commission Staff was especially critical of the "collaborative" approach to plant investment decision-making and advance prudence and project review process that is the foundation of Rate ACEP. Staff witness Reardon was unequivocal in noting the proposal "places unreasonable demands on the Commission, Staff and intervenors." Staff Ex. 1.0 at 9. He noted that "neither the Commission nor its Staff has the intimate

knowledge of ComEd's distribution system necessary to oversee its design and upkeep on a detailed and continuous basis." *Id.* at 19. He observed that Staff is much better suited to reviewing ComEd's decisions for whether it engaged in prudent planning and executed those plans efficiently after the fact. He stated that under traditional regulation, "the Commission evaluates the support that ComEd provides for the investment and spending decisions that *it has already made* in the context of its operations." *Id.* at 9. He concluded that this is a much more reasonable method for establishing recoverable rate base and expenses. *Id.*

AG witness Brosch was equally critical of the Rate ACEP review process. *See* AG Initial Brief at 34. As discussed further below, the Rate ACEP review process in no way lightens the regulatory burden of the Commission and intervenors.

D. Alternative Regulation in General and Rate ACEP

1. Defining Alternative Regulation

ComEd states that alternative regulation "is a form of utility ratemaking where additional factors are used to set utility rates, *separate from traditional rate cases*." ComEd Brief at 34 (emphasis added). Noting that rates under alternative regulation "are usually tied to some benchmark measuring success in achieving whatever goal is set," ComEd asserts that its proposal to have its pre-approved Rate ACEP budgets serve as a basis for both cost recovery and program evaluation constitutes a valid benchmark. *Id.*

Two observations integral to the evaluation of the Rate ACEP proposal should be noted. One, ComEd seems to be suggesting that alternative regulations plans should be viewed as supplemental and "*separate from traditional rate cases*" — presumably in recognition of the fact that the Company's Rate ACEP proposal would only *augment*, rather than replace, the traditional

ratemaking process for certain plant and O&M investments and expenses. There is no support in Section 9-244 of the Act that the General Assembly was interested in carving out plant investments (such as UUFR) or expense categories (such as the low income expense) for special revenue recovery in addition to setting rates through traditional rate cases and labeling it alternative regulation. ComEd's does not dispute that its proposal would not replace traditional regulation, but merely add an additional layer of cost recovery for certain kinds of utility plant and projects outside of traditional rate cases. As noted in the AG Initial Brief, this in no way smoothes or lessens the regulatory process. *See* AG Initial Brief at 35-41.

The most common objective of alternative regulation is to improve the overall framework of regulation, by moving away from the historical "cost-plus" approach using traditional utility rate cases and toward new approaches that can provide potentially larger rewards for efficiency and punishments for inefficiency, while at the same time reducing the administrative costs of conducting rate cases. A successfully implemented alternative regulation framework should be designed to induce higher utility productivity in the long term, while eliminating or reducing the need for rate cases and ensuring that any benefits from improved overall efficiency are equitably shared between utility shareholders and ratepayers. AG Ex. 1.0 at 8.

The Rate ACEP proposal accomplishes none of these goals, and indeed is nothing more than a repackaged Rider SMP, from the 07-0566 docket. ComEd's Rate ACEP retains regular rate cases, and would only add to the regulatory work of the Commission, rather than streamline it. While ComEd witness Ross Hemphill may have sincerely envisioned a process in which "disagreements could be resolved around a conference table, instead of through litigation"¹⁴, the reality would be much different, as evidenced by the Staff and intervenor responses to the Rate

¹⁴ Id. lines 298-300.

ACEP proposal. Given the testimony in this docket that highlights the stark and fundamental differences between ComEd and the parties as to (1) what constitutes a reasonable alternative regulation approach; (2) how risk should be apportioned between the Company and ratepayers; and (3) who should be responsible for making investment decisions related to new technologies; the Rate ACEP version of alternative regulation would hardly constitute streamlined regulation.

Second, as thoroughly discussed in the AG's Initial Brief, both Staff and AG witnesses agreed that the Company's budget baseline is an ineffective metric for creating incentives and evaluating a program's performance. *See* AG Initial Brief at 45. As noted by AG witness Brosch, budgets that are created by ComEd management can be useful as internal tools to track spending relative to plans, but such budgets do not represent performance benchmarks of the type employed in alternative regulation. Performance benchmarks should be objectively determined through comparisons to historical actual performance or to financial performance of peer companies, rather than against cost targets set up by the same personnel whose performance will be judged against the targets. A fundamental problem with utilization of cost budgets as performance benchmarks is the potential for scoping and timing changes to alter the amount and complexity of actual work that is deemed complete for comparison to the budget. AG 3.0 at 6.

The bottom line is that ComEd's assertion that its proffered Rate ACEP project budgets qualify as an alternative regulation metric under Section 9-244 of the Act is not credible based on the record evidence.

2. Analyzing Rate ACEP

Under this section of its Brief, ComEd merely asserts that its proposal is "a pilot of alternative regulation and a means of testing whether it should be pursued on a larger scale."

ComEd Brief at 35. Given Rate ACEP’s open-ended nature (notwithstanding the biennial review, the tariff itself has no sunset provision) and the proposals in this case for revenues to cover \$130 in capital investment and \$65 million in O&M expense recovery (including the distribution automation and 130,000 AMI smart grid projects the company would seek cost recovery for in its first Rate ACEP five-month proceeding), one shudders to think what this pilot could mean for ratepayer pocketbooks should it be pursued “on a larger scale.”

ComEd claims that the proposal is designed “so that customers are not at risk.” ComEd Brief at 35. In fact, the opposite is true. Ratepayers would find themselves in the unenviable position of having to pay for projects, through a surcharge over and above that which is collected through the rate case process, which (1) ComEd’s own senior management and shareholders do not find worthy of financing, either through the capital markets or internally generated funds (*see, e.g.*, Tr. 71-73); and (2) the Company admits are not necessary for the provision of safe, reliable, least-cost delivery service.

In this docket, the People presented the testimony of Roger Colton, a nationally renowned expert and researcher specializing in utility rate and customer service issues, who presented extensive demographic information about the economic conditions and risks facing ComEd’s customers. *See* AG Ex. 2.0 at 71-91. Mr. Colton discussed several major trends that should inform the Commission in reviewing the Company’s requests for increased revenues through the Rate ACEP proposal.

First, Mr. Colton testified that for the two bottom quintiles, or 40% of ComEd’s customers, basic household expenditures exceed household income, and “electricity and utility costs are taking an increasingly large share of household expenditures.” AG Ex. 5.0R at 9. Mr. Colton provided a detailed analysis of the changes in household income over time, showing that

“[i]n Illinois, not only are the lowest income households falling further behind, but households in the middle are falling further behind as well.” *Id.* at 20. Specifically, he presented data showing that: “In the time period between 1998-2000 and 2004-2006, the average income of the top quintile grew by \$12,880 (10.3%), while the average income of the bottom quintile contracted by \$1,588 (-8.0%). The average income of the middle quintile contracted by \$1,629 (-3.0%).” *Id.* & RDC-8.

In balancing the interests of investors, consumers and the public or community generally, the Commission needs to be aware of the circumstances facing consumers who rely on essential electricity service. Mr. Colton demonstrated that not only is income declining for a significant portion of the population, but household expenses have increased to the point that the “self sufficiency standard” (the level of expenditure needed to maintain a minimum standard of living without assistance) requires an income of between \$55,000 and \$60,000 per year. *Id.* at 16. Yet, the average income for the middle 20% of the population was only \$46,012 in 2009. *Id.* at Sch. RDC-1. Illinois law is premised on a public and statutory interest in protecting “safe, reliable, and affordable service.” 220 ILCS 5/16-101A; 5/1-102(d)(viii). The Commission’s authority under Section 9-244 of the Act to approve alternative regulation does not extend to permitting a utility to add on surcharges, over and above those rates established in a traditional rate case, to conduct “a pilot of alternative regulation and a means of testing whether it should be pursued on a larger scale.” ComEd Brief at 35. The Commission still retains the obligation to ensure that rates are “just and reasonable” under Article IX of the Act.

Under Rate ACEP, all risk of capital investment, normally borne by the Company and shareholders, is shifted to ratepayers. For example, the EV program is a pilot, for which any economic benefits are uncertain and for which ComEd’s proposal would shift costs and risks to

ratepayers and away from shareholders. It remains unclear as to how ratepayers will benefit from this \$5 million project such that a surcharge should be assessed. Regarding smart grid investments, the Commission has yet to conclude that the benefits outweigh the costs of various smart grid investments, such as AMI. Until that assessment is made, it is bad public policy to place Staff and intervenors in the position of having to engage in an open-ended series of five-month proceedings in which they are given the daunting task of assessing the cost-effectiveness and prudence of various smart grid technologies so that ratepayers can be finance them between rate cases. And ComEd's argument that such assessments are normally made in rate cases is simply false. As pointed out by Staff witness Reardon, Staff is much better suited to reviewing ComEd's decisions for whether it engaged in prudent planning and executed those plans efficiently after the fact. Staff Ex. 1.0 at 9.

As discussed further below, ComEd's Rate ACEP proposal fails the critical measures of an alternative regulatory proposal – whether it is likely to lead to lower customer rates and whether it offers customers substantial and identifiable benefits.

E. Rate Design Issues

III. STATUTORY REQUIREMENTS AND REQUESTED APPROVALS

A. Section 9-244 of the Public Utilities Act

1. Section 9-244(b): Findings for Approval of Alternative Rate Regulation Program.

In order for the Commission to approve ComEd's proposal, the Commission must find that it satisfies all eight of the criteria listed under Section 9-244(b) of the Act. 220 ILCS 5/9-

244(b). As discussed below and in the AG Initial Brief, ComEd failed in its burden of proving its Rate ACEP program met these statutory criteria.

a. Finding under Section 9-244(b)(1)

In its Brief, ComEd asserts that its Rate ACEP program “is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program and that are consistent with the provisions of Section 9-241 of the Act.” ComEd Brief at 38, citing 220 ILCS 5/9-244(b)(1). In asserting this, the Company ignores the fact that the Rate ACEP charges *are in addition to* the rates recovered under traditional rate cases, and stating that “customers’ rates will be lower than they would be if the same projects were implemented through traditional rate of return regulation.” ComEd Brief at 38.

This parsing of Section 9-244(b)(1) suggests that ComEd will be providing some different service than the existing electric delivery service if Rate ACEP is approved, where the Company inserts the phrase “the same projects” in this sentence. As AG witness Brosch noted, there is no change in the quality or quantity of energy deliveries that ComEd would provide with or without Rate ACEP. AG Ex. 3.0 at 13.

The Company further asserts that if ComEd were to fund the same investments through traditional test year regulation, “customers would receive no 5% credit and the realization of savings would await the next general rate case.” *Id.* But this point is based on frail logic, as AG witness Brosch pointed out. Rate ACEP is designed to calculate surcharges to customers and is mathematically incapable of producing rate credits in the form proposed. Indeed, the Company’s

own illustrative calculations predict rate increases from Rate ACEP.¹⁵ It is illogical to assume that Rate ACEP recovery of 95 percent of incremental O&M expenses represents lower rates to customers because it is not 100 percent, when none of these incremental expenses are recoverable between rate cases without approval of Rate ACEP. It is similarly illogical to pretend that an incremental charge to customers for capital expenditures under Rate ACEP will produce lower rates to customers because it this charge might have been even higher if not for budgetary constraints. AG Ex. 3.0 at 13-14.

Other flawed assumptions permeate the idea that Rate ACEP will produce lower rates for consumers. The only way that Rate ACEP can compare favorably to traditional ratemaking from a customer impact perspective is if we assume continuous regulation and no regulatory lag. This is a flawed assumption because traditional regulation involves periodic consideration of all costs and revenues within a test year to establish the revenue requirement. Mr. Brosch rejected as specious ComEd witness Hemphill’s suggestion that the same changes in costs for the proposed projects would translate immediately into higher rates under both traditional regulation and Rate ACEP, resulting in the 95 percent expense limitation and overall budget constraints producing claimed “lower rates” for customers. AG Ex. 3.0 at 12-14. Rider ACEP is designed and intended to reduce regulatory lag, by translating project costs into higher rates to customers between traditional rate cases. That fact belies any suggestion that the ComEd program “is likely to result in rates lower than otherwise would have been in effect under traditional rate of return regulation for the services covered by the program... .” 220 ILCS 5/9-244(b)(1).

b. Finding under Section 9-244(b)(2)

¹⁵ ComEd Ex. 1.3.

Section 9-244(b)(2) provides that the Commission must conclude that “the program is likely to result in other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program.” 220 ILCS 5/9-244(b)(2). In its assertion that its Rate ACEP proposal has met this test, ComEd argues that “(t)he relevant comparison is benefits without the Alternative Regulation program versus benefits with the Alternative Regulation program.” ComEd Brief at 39. The Company then goes on to cite the alleged benefits each project is supposed to deliver, as discussed in Section II above.

This argument, contrary to ComEd’s interpretation of this Section, is not sustainable. It is not enough to assert that benefits will be created by investing in these programs because if the Rate ACEP program is not approved the projects will not be pursued. The Commission Staff rightly points out that ComEd’s interpretation of Section 9-244(b)(2) is a tautology (the benefits are likely to occur because if the program is not approved, the projects would not be implemented and any program benefits would not be realized). Staff Brief at 55. There must be a context for assessing alleged benefits. Aside from the Low Income Assistance program, however, ComEd has not demonstrated “other substantial and identifiable benefits that would be realized by customers served under the program and that would not be realized in the absence of the program.”¹⁶ The costs and benefits from the other three proposed programs can readily be addressed and realized under traditional regulation without Rate ACEP, as described in Part II of the AG Initial Brief. *See* AG Initial Brief at 8-24.

As noted in the AG Initial Brief, there is nothing special about the EV pilot, as it could readily be absorbed into ComEd’s routinely large need to deploy replacement vehicles each year.

¹⁶ 220 ILCS 5/9-244 (b)(2).

Rather than simply integrating the proposed EV Pilot into normal vehicle replacements, Rate ACEP clearly envisions shifting all the up-front costs and risks of the Company's planned EV research project onto customers, even though any benefits from this pilot are far from certain. AG Ex. 1.0 at 28.

With respect to the UUFR program, ComEd claims benefits of: a) improved reliability, b) improved safety, c) meaningful job creation, and d) potential reduction in long-term costs. ComEd has historically approached this work using a reactive approach to cost-effectively meet service requirements¹⁷ and according to ComEd witness Michelle Blaise, there is nothing improper or imprudent about the Company's approach to underground facilities maintenance. *See* ComEd Ex. 4.0 at 6-7. Under these circumstances, there has been no showing by ComEd that existing urban underground facility maintenance practices or spending levels are inadequate or that customers should be made to fund more aggressive testing and replacement of such facilities in order to correct unreliable or unsafe conditions or cost-effectively create new jobs. Even if the Commission accepts Ms. Blaise's suggestion that paying for an accelerated level of investment provides some level of improved reliability, there is no specific information provided in the Company's filing identifying or quantifying any benefits, nor any showing that such benefits are not achievable under traditional regulation.

The Company also asserts that benefits will flow from the installation of AMI meters and other smart grid technology. *See, gen'ly*, ComEd Ex. 2.0 and 3.0. As noted in Part II.D of the AG Initial Brief, however, an evaluation of the possible benefits that will flow from investment in smart grid technologies, including pilot deployment of AMI meters and customer applications and distribution system automation, will be studied in the yet-to-be-opened Smart Grid Policy

¹⁷ ComEd Ex. 4.0, lines 181-182.

Docket. In addition, the evaluation report of the AMI pilot, which already cost ratepayers millions of dollars, will not be issued until the summer of 2011. AG Initial Brief at 24-35. Whether benefits to customers can justify cost-effective, widespread deployment of smart grid remain unanswered at this time. Approving a cost recovery mechanism for these investments before the Commission has had a chance to evaluate the technology's benefits is a classic case of putting the cart before the horse.

As noted by AG witness Brosch, for now and even after the smart grid Policy Docket is concluded, ComEd can continue to invest in distribution automation as it has historically, where that investment is needed based on applying conventional technical criteria to the individual circumstance.¹⁸ Customers can continue to enjoy the benefits of such cost-effective ongoing deployment under traditional regulation. It simply is inappropriate to require ratepayers to pay a Rate ACEP surcharge for new smart meters – or to design a special cost recovery mechanism for the meters – before the Commission and stakeholders have formally evaluated the results and any benefits of the ratepayer-funded pilot. That is not a discernible benefit.

The People do not dispute that the continuation of ComEd's Low Income Assistance Programs will produce benefits, as discussed in detail in the Direct testimony of Roger Colton. *See, gen'ly*, AG Ex. 2.0. However, as explained by Mr. Colton, there is no reason such programs could not be made available under traditional rate case regulation with funding by Exelon shareholders rather than ratepayers. *See* AG Initial Brief at 20-24. Moreover, funding programs in this manner fit none of the criteria for lawful rider recovery of expenses. *See* AG Initial Brief at 41-44.

¹⁸ ComEd Ex. 2.0, lines 143-148.

AARP witness Alexander similarly concluded that ComEd failed to propose any objective or quantifiable means to evaluate its performance other than keeping to its predetermined budgets for any of the four areas of proposed investment. AARP Ex. 1.0 at 17-18. IIEC witness Robert Stephens likewise concluded the same. IIEC Ex. 1.0 at 22-23; IIEC Brief at 13-16.

The overwhelming, substantial evidence of the record supports a finding that ComEd's proposal does *not* satisfy Section 9-244(b)(2) of the Act.

c. Finding under Section 9-244(b)(8).

Section 9-244(b)(8) of the Act provides that “the program includes provisions for equitable sharing of any net economic benefits between the utility and its customers to the extent the program is likely to result in such benefits.” 220 ILCS 9-224(b)(8). For this section of its Brief, ComEd simply reiterates its position that under Rate ACEP, “(c)ustomers get a guaranteed O&M credit and shared efficiency benefits, on top of program benefits.” ComEd Brief at 40. The Company asserts that its recovery of its O&M expenses and return on capital are at risk if it does not successfully bring plan benefits to customers “on or within the budget deadband.”

Here again, the Company failed to sustain its burden of satisfying the Section 9-244 criteria. The budget baseline that serves as the metric for establishing alleged customer benefits is flawed, as discussed earlier in this Brief. AG witness Brosch characterized the Rate ACEP proposal *not* as equitable sharing, but rather an aggressive recovery of, and conversion of, discretionary costs into new revenues for ComEd, rather than an “equitable sharing”. AG Ex. 1.0 at 34. The EV program is a pilot, for which any economic benefits are uncertain and for which ComEd's proposal would shift costs and risks to ratepayers and away from shareholders.

If the UUFR produces any net economic benefits, through reduced outages and outage response costs, the resulting cost savings would not be shared with ratepayers until they are captured within a future rate case test year.

Mr. Colton explains in his testimony why recovery of low income assistance program costs from ratepayers is inequitable. The inescapable message he delivers is that ComEd, along with its Exelon parent and generation affiliate, having spent significant amounts to support ComEd CARE over the past five years, cannot now argue that continuing to offer bill payment customer assistance programs is a corporate burden so great that it must ask ratepayers to bear even higher rates to fund what its independent judgment embraced years ago as a reasonable expenditure, and in the same breath argue that this is a significant benefit to ratepayers.

For all of these reasons, ComEd has failed to sustain its burden of satisfying Section 9-244(b)(8) as well.

d. Findings under sections 9-244(b)(3) – (b)(7)

The People do not dispute that the proposed plan satisfies section 9-244(b)(3) through 9-244(b)(6).

Under Section 9-244(b)(7), any alternative regulation program must include annual reporting requirements and other provisions that will enable the Commission to adequately monitor its implementation of the program. ComEd’s proposal would require the Commission to play, what is characterized as in its Petition as a “central role in determining the direction ComEd will take with future investments in Smart Grid technology, accelerated underground

facility reinvestment, and EV, as well as low income assistance.”¹⁹ Given the amount of analysis Staff and Intervenors must accomplish in reviewing any Rate ACEP project proposals, as well as the short time frames (five months) envisioned for the formal Commission proceedings, it is unlikely that the Commission can effectively play “a central role” in determining ComEd’s investments. *See* AG Initial Brief at 31-35. In addition, the Commission’s review is limited to the proposed projects and budgets offered by the Company and the constraints of the administrative process. ComEd’s reports regarding how it performed in comparison to the budgets it sets are, for the reasons discussed earlier in this Brief and in the AG Initial Brief, not meaningful information to evaluate program performance.

For these reasons, the evidence in the record failed to demonstrate that the ComEd-proposed reporting requirements will “enable the Commission to adequately monitor its implementation of the program.”

IV. OTHER ISSUES

The Natural Resources Defense Council (“NRDC”) did not evaluate ComEd’s proposed Rate ACEP mechanism. Instead, it offered what it described as an alternative to the ComEd proposal that “would layer additional funding and performance criteria atop Illinois’ existing energy efficiency policies and infrastructure.” NRDC Brief at 4. NRDC proposes a two-year alternative regulation mechanism, subject to renewal, through which ComEd would:

(i) collect costs for energy efficiency programs additional to the 220 ILCS 5/8-103 programs on the same basis it does now, as a kWh-based adjustment charge;

(ii) prove that its alternative regulation portfolio of energy efficiency programs is cost effective based on Illinois’ existing total resource cost test;

¹⁹ ComEd Verified Petition at page 12.

(iii) report on its progress to stakeholders and Commission Staff regularly at the existing Illinois Stakeholder Advisory Group;

(iv) report on its progress to the Commission in a post-evaluation report, filed concurrently with ComEd's Program Year 5 and 6 evaluation reports; and

(v) reward ComEd a portion of the net benefits of its alternative regulation portfolio, as measured by the Total Resource Cost test, if ComEd exceeds the energy savings targets in 220 ILCS 5/8-103, up to an annual cap of \$17.5 million, according to the following schedule:

- *If ComEd exceeds the targets by 5%-9.99%, ComEd is awarded 5% of net benefits,*
- *If ComEd exceeds the targets by 10%-19.99%, ComEd is awarded 7.5% of net benefits,*
- *If ComEd exceeds the targets by 20% or more, ComEd is awarded 10% of net benefits.*

NRDC Brief at 4-5, citing NRDC Ex. 1.0 at 7. NRDC stresses that ComEd would only get an *incentive* if it exceeded the targets in 220 ILCS 5/8-103, and the mechanism is only meant to be implemented if the Commission "decouples" ComEd's fixed cost recovery from sales in the residential and small commercial rate classes in its pending rate case, Docket No. 10-0467.

NRDC Brief at 5. ComEd would invest an additional \$77.86 million (approximately) in energy efficiency in the two years the mechanism operates. *Id.*

While the Attorney General's office has championed energy efficiency efforts both before the Commission and the General Assembly, and welcomes any discussion that attempts to increase investment in energy efficiency, the NRDC proposal is a non-starter for several reasons. First and foremost, it is contingent upon an ill-advised decoupling proposal in the ComEd rate case, ICC Docket No. 10-0467. The People will not repeat here all of the arguments presented in their briefs in ICC Docket No. 10-0467 against the pernicious form of per customer revenue decoupling NRDC advocates. Suffice it to say, that both the NRDC decoupling proposal and the sample decoupling tariff presented by ComEd in that case are illegal under Illinois law.

Decoupling, as proposed by NRDC and in ComEd's "Plan B" sample tariff, constitutes illegal single-issue ratemaking. It is illegal because per customer revenue decoupling has the effect of adjusting utility rates based solely upon changes in residential, per-customer sales volumes, without regard to other changes in the utility's rate base, operating expenses or the cost of capital. Decoupling assumes, inappropriately, that the utility's financial health is dependent on ensuring that an established revenue *per customer* level is maintained between rate cases. This unjustified premise for a revenue per customer decoupling mechanism ignores the fact that utility expenses, rate base, and cost of capital are dynamic and ever-changing. For example, the revenue per customer decoupling approach being advocated by the NRDC fails to properly account for (1) the revenues the company gains when new customers are added; (2) changes in usage and sales to customer classes not decoupled; (3) changes in operating expenses, such as labor force reductions and operating efficiencies gained through new technology; (4) changes in the rate base; and (4) changes in the cost of capital – all elements that affect a utility's revenue requirement. This is why decoupling is reasonably characterized as single-issue ratemaking; it changes future customer rates to account for changes in only a single element of the revenue requirement formula, while ignoring all other changes. ICC Docket No. 10-0467, AG/CUB Ex. 12.0 at 6-7.²⁰

²⁰ In addition, the decoupling tariff proposed by ComEd in response to Mr. Cavanagh's proposal constitutes an illegal rider under *Commonwealth Edison Co. v. Illinois Commerce Comm'n*, ("ComEd"), 937 N.E.2d 685 (2d Dist. 2010). Because riders always permit direct recovery of a single cost, rather than incorporating that cost into the aggregate calculation of the revenue requirement, they always pose, at the very least, a "danger of single-issue ratemaking." *City of Chicago II*, 281 Ill. App. 3d at 628; *see also ComEd*, 937 N.E.2d at 708 ("Because a rider is a method of single-issue ratemaking, by nature, it is not allowed absent a showing of exceptional circumstances."). In *ComEd*, the court comprehensively reviewed all of the Illinois judicial decisions involving riders, and identified the general principles that bind these cases into a uniform legal standard. The Court concluded that exceptional circumstances necessary to justify a rider arise only when the proposed rider is designed to "recover a particular *cost* if (1) the *cost* is imposed upon the utility by an external circumstance over which the utility has no control and (2) the *cost* does not affect the utility's revenue requirement." *Id.* at 687 (emphasis added). Decoupling, as proposed by NRDC, would recover lost per customer revenues generally, not a particular *cost* or expense as the Court required.

Second, any alternative regulation proposal implemented in this docket under Section 9-244 of the Act must not upset the framework for investing in and seeking cost recovery for energy efficiency programs implemented under Section 8-103 of the Act. 220 ILCS 5/8-103. The NRDC proposal conflicts with both the cost cap in Section 8-103(d) that limits ratepayer funding of efficiency investments and the specific provision that permits cost recovery for “reasonably and prudently incurred expenses for energy efficiency and demand-response measures.” *See* Section 8-103(a), (e). The costs for energy efficiency investments that can be charged to ratepayers are limited to the amounts specified in Section 8-103(d). 220 ILCS 8-103(d)(4).

The NRDC proposal, on the other hand, would permit ComEd to assess customers, through a per kwh charge, an additional \$77.86 million in energy efficiency costs, over and above that which is permitted under Section 8-103. While NRDC points to the *net* benefits customers stand to achieve under this increased efficiency investment, the clear limitation/cost cap on revenue collection from ratepayers under Section 8-103 for utility-provided efficiency investments supports rejection of the NRDC proposal. Rules of statutory interpretation do not permit NRDC’s selective and ultimately contradictory reading of Section 8-103 and Section 9-244 of the Act. In interpreting a statute, legislative intent must be ascertained from a consideration of the entire act, its nature, its object and the consequences resulting from different constructions. *Ryan v. Board of Trustees of General Assembly Retirement System*, 236 Ill. 2d 315, 924 N.E.2d 970 (2010). The NRDC proposal, when viewed under the Act, is unlawful.

Accordingly, the NRDC decoupling request fails to satisfy the criteria the Second District Court elicited for permissible use of riders.

For these reasons, the NRDC proposal should be rejected.

V. CONCLUSION

For the foregoing reasons, the People respectfully request that the Commission enter an order that rejects ComEd's Rate ACEP proposal and specific project approval requests, as well as the alternative proposal submitted by NRDC, consistent with the arguments presented in this Brief and the AG Initial Brief, filed on February 17, 2011.

Respectfully submitted,

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